

CASES IN CONTROVERSY

Sullivan v. Scoular Grain: Injured Employees Further Forced to Bear Burden of Boss's Neglect

by Alan W. Mortensen

The Utah Supreme Court decision of *Sullivan v. Scoular Grain*, 853 P.2d 877 (Utah 1993), represents a further blow to injured employees' rights. Under Utah common law, an employee had the right to fully recover damages in tort against an employer for the employer's breach of the duty to provide a safe workplace and to properly supervise an employee's labors. See, e.g., *Scudder v. Kennecott Copper Corp.*, 881 P.2d 890, 894 (Utah 1994), *re-hearing pending*. But with the imposition of the workers' compensation system, employees lost their right to prove and be compensated for the negligence of employers and fellow employees. An employee who suffers an industrial injury is compensated under the workers' compensation scheme without inquiry into the employer's actions. The oft-cited policy determination behind the workers' compensation scheme "is to provide a speedy and certain compensation for workmen and their dependents and to avoid the delay, expense and uncertainty which were involved prior to the act; and the concomitant purpose of protecting the employer from the hazards of exorbitant and in some instances perhaps ruinous liabilities." *Lantz v. National Semiconductor Corp.*, 775 P.2d 937, 938 (Utah Ct. App. 1989) (citing *Adamson v. Okland Constr. Co.*, 508 P.2d 805, 807 (1973)).

One exception exists to the exclusive remedy of the workers' compensation act. See UTAH CODE ANN. § 35-1-60 (1988) (Utah's Exclusive Remedy Provision). In *Bryan v. Utah International*, 533 P.2d 892, 894 (Utah 1975), the Utah Supreme Court recognized an exception for injuries intentionally caused to employees by employers. The subsequent decision by the Utah Court of Appeals in *Lantz* demonstrates that this "intentional injury" exception provides no substantive relief to employees. In order for an injured employee to recover in tort

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against an employer, the employee must prove more than just a "substantial certainty that injury will follow." 755 P.2d at 940. The Court of Appeals noted:

Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing to provide a safe place to work, or even willfully

and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental nature.

Id. (quoting 2A A. Larson, *THE LAW OF WORKMEN'S COMPENSATION* § 68.13 (1988)).

As a result of the *Lantz* decision, an employee must prove the employer "had an actual deliberate intent to injure him . . ." *Id.* This high standard of proof effectively eliminates an employee's remedy to recover for an employer's tortious conduct. *Id.* at 939 n.3 ("We note that no reported Utah cases recognizing the exception created in *Bryan* have invoked that exception."). Thus, for all practical purposes, an employee is left to the inadequacies of the workers' compensation system for redress.¹

Under the workers' compensation scheme, an injured employee is forced to bear the lion's share of an employer's culpable conduct. It is no secret that an employee injured by his employer's negligence is most likely never fully compensated for injuries, because "the amounts which may be awarded are at all times very modest, and in inflationary times practically penurious . . ." *Thatcher v. Industrial Comm'n*, 207 P.2d 178, 182 (Utah 1949).

Nevertheless, the workers' compensation system provides the right to bring suit against negligent third parties, which right provides one venue for full redress of employees' injuries. See UTAH CODE ANN. § 35-1-62 (1988). Unlike the no-fault

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¹Moreover, an employer is not vicariously liable for an employee's intentional conduct that occurred within the scope and course of employment, unless the

employer directed or intended the employee to so act. *Mounteer v. Utah Power & Light Co.*, 773 P.2d 405, 407 (Utah Ct. App. 1989).

system of workers' compensation, where employees bore the risk of "paying" for the negligence of employers, juries did not allocate fault to immune employers on the verdict form prior to the 1986 enactment of the Liability Reform Act. See *Wollam v. Kennecott Copper Corp.*, 663 F.Supp. 268, 274 n.9 (D. Utah 1987) ("[A]s a matter of law, [the third party] is the sole cause of 'liability' that could be paid to the plaintiff."). Experience demonstrates that juries naturally allocate an immune employer's fault among both plaintiffs and defendants. See *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 886 (Utah 1993) (Stewart, J. dissenting). Other commentators assume that third-party defendants were allocated the entire amount of an immune employer's fault. See *id.* at 882; Dale T. Hansen, *Sullivan v. Scoular Grain Co.: Apportioning the Fault of Immune Employers*, 1994 B.Y.U. L. REV. 187, 190 (1994). Thus, injured employees and industry both bore the burden of employer negligence, while the immune, albeit negligent, employer pillaged the employee's third-party recovery for reimbursement of workers' compensation benefits. See UTAH CODE ANN. § 35-1-61 (1988). This burden shifted solely onto injured employees as a result of the *Sullivan* decision.

Factual Background of Sullivan

Kenneth Sullivan lost his arm and leg on the railroad tracks of the Freeport Center. Sullivan brought suit against numerous entities that were later found by the trial court to be Sullivan's employers, and thus dismissed under the exclusive remedy provision. Sullivan also brought suit against Trackmobile, Inc., G.W. Van Keppel Company, Oregon Short Line Railroad Company, Utah Power & Light, and Union Pacific Railroad Company.

Defendant Trackmobile moved to have the jury apportion the fault of all those who were initially named defendants. Sullivan argued that the immune employers' actions could not be apportioned by the jury because, under the Utah

Liability Reform Act, Utah Code Annotated, section 78-27-39, a jury can only apportion the fault attributable to "each defendant." Utah Code Annotated, section 78-27-37(1) specifically defines a defendant as "any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery." Plaintiff argued that because the employers were immune under the exclusive remedy provision, they were not "defendants," and thus were excluded from apportionment. *Sullivan*, 853 P.2d at 878-79.

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The Slippery Slide of Injured Employees' Rights

In *Sullivan*, the Utah Supreme Court held that a jury is required to "account for the relative proportion of fault of a plaintiff's employer that may have caused or contributed to an accident, even though the employer is immune from suit." *Id.* at 878. While justifying its decision by the language of the Utah Liability Reform Act, the court placed little emphasis on the definition of "defendant," and focused instead upon its notions of "equitable considerations." In addressing the equities, the court ignored Sullivan's argument that allocation of his employer's negligence would force him to bear a disproportionate share of his damages. Instead, the court adopted the defendants' argument that they, not the injured employee, would be forced to bear the entire amount of damage caused by the immune employers.

The dissent recognized that the equity handed out by the majority opinion was one-sided, was based upon faulty assumption and inquiry into legislative

intent, and was void of empirical observation of the jury apportionment process:

Practically speaking, a jury would naturally be inclined to allocate the fault of an immune person among both plaintiffs and defendants. If a plaintiff is 20% at fault, each of two named defendants 30% at fault, the Legislature could reasonably assume that a jury would allocate the immune person's 20% fault among the plaintiff and the defendants, probably according to their respective percentages of "actionable fault." Thus, there is no reason to assume, as the majority does, that the immune person's fault will be attributed solely to defendants under Utah's comparative negligence scheme.

The majority position will necessarily result in the entire amount of an immune person's fault being deducted from a plaintiff's damages.

Id. at 886 (Stewart, J., dissenting).

Adding to the grim plight of injured employees, the court recognized that an immune employer who may be found to be at fault at a near intentional level may further escape liability for payment of workers' compensation benefits. An immune employer is statutorily entitled to recover the entire amount it has paid in workers' compensation benefits from the third-party verdict. Though seeking to protect defendants from the perceived inequities of the statutory language of the Utah Liability Reform Act, the court left employees a "legislative" remedy, not a judicial remedy. When forced "between two evils," the court shunned splitting the baby between the third party and the employee, placing the entire "evil" upon the injured employee, who is least equipped to bear such a plight. See Dale T. Hansen, *supra*, at 198.

The Supreme Court's decision in *Sullivan* further stripped injured employees of their rights to recover the full measure of their damages. An injured employee who 100 years ago was entitled to sue his employer for violation of its duty to provide a safe workplace,

now can only maintain suit against his employer if the employee can show "an actual deliberate intent to injure him . . ." *Lantz*, 775 P.2d at 940. In return for foregoing the right to sue an employer, an employee receives workers' compensation benefits, which are paltry in comparison to an employee's actual damages. See *Thatcher v. Industrial Comm'n*, 207 P.2d 178, 182 (Utah 1949). Moreover, as a result of the *Sullivan* decision, an employer's fault reduces to nearly nothing the employee's ability to recover proven damages, while allowing the employer to strip the remaining verdict to recoup its workers' compensation payout. Clearly, the *quid pro quo* envisioned through the workers' compensation scheme has left injured employees with almost nothing to compensate them for their damages. The aftermath of *Sullivan* left employees, not employers, in a position of bearing "exorbitant and in some instances perhaps ruinous liabilities." *Lantz*, 775 P.2d at 938 (quoting *Adamson v. Okland Constr. Co.*, 508 P.2d 805, 807 (Utah 1973)).

Legislative Postscript

In the aftermath of *Sullivan*, the Utah State Legislature amended the Utah Liability Reform Act in an attempt to partially rectify the decision's inequities. The

Legislature's amendments more fully and equitably allocate an immune employer's fault among all parties, including the employer. See UTAH CODE ANN. § 78-27-39 (1994). Under the amended provision, if an immune employer's proportion of fault is less than forty percent, the fault

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is allocated among the other parties, including the injured employee, in proportion to the percentage of fault initially attributed to each party by the jury.² If an immune employer's fault exceeds thirty-nine percent, the employer's fault is not allocated, and the injured employee continues to bear the entire burden of the employer's acts for purposes of the jury's apportionment of fault. See Brent W. Wilcox & Tim Dalton Dunn, *Significant Changes in Comparative Fault and Workers' Compensation Reimbursement*, 7 UTAH BAR J. 7-11 (1994).

Conclusion

Injured employees have lost significant rights to be fully compensated for their damages. This precarious pathway began with the imposition of the workers' compensation scheme, thereby allowing an employer immunity from liability for failing to provide a safe workplace to its employees. The path continued with the *Lantz* decision, which broadened an employer's immunity from suit unless the employee was able to prove an employer's actual, deliberate intent to hurt the employee. The path reached a tragic crossroad with the *Sullivan* decision, as injured employees were left to bear the entire burden of an employer's fault in a jury apportionment, and also were forced to reimburse fully the workers' compensation benefits the employer paid out. Though recent legislative enactments have turned the path back toward a more equitable distribution of immune employers' faults, the fact remains that injured employees are the least equipped to bear the cost of an employer's negligence. But based upon the "equitable considerations" of the Utah Supreme Court in *Sullivan*, employees are forced to bear the brunt of employer negligence. —

²Employers are not entitled to full reimbursement of workers' compensation liens if their fault exceeds thirty-nine percent; rather, their right to reimbursement is

reduced by the percentage of fault attributed to the employer by the jury. See UTAH CODE ANN. § 35-1-62(5)(b)(i) (1994).

